CIRCUIT COURT OF FRANKLIN COUNTY.

MARTIN v. NORFOLK & WESTERN RY. CO.

CARRIERS OF PASSENGERS—*Presumption of negligence on happening of injury—Presumption inapplicable where no physical defect or derangement.* There is no presumption of negligence on the part of the carrier, from the mere happening of an injury to a passenger, where not caused by defects in appliances, or breakage of machinery, or by collision or derailment, or similar occurrences, but due to the method of operating the train, causing a sudden jar, not affirmatively shown to be negligent.

CARRIERS OF PASSENGERS—FREIGHT TRAINS—*Injury to passenger by sudden jar.* Mere proof that a passenger on a freight train was injured by being thrown against the wall of the caboose in which he was riding as a passenger, caused by the sudden jamming of the cars in the operation of the air brakes, is not of itself sufficient to establish a *prima facie* case of negligence on the part of the railroad company.

Anderson & Hairston, for the plaintiff.

Dillard & Dillard and *J. Allen Watts,* for the defendant.

The opinion states the case.

SAUNDERS, Judge:

This case is before me on a demurrer to the evidence.

The rule applicable to a demurrer to evidence is a familiar one. The demurrant admits the truth of his adversary's evidence and all just inferences which the jury could have properly drawn therefrom, and waives all his own evidence in conflict therewith, and all inferences from his own evidence, although not in conflict therewith, which do not necessarily result therefrom.

The plaintiff, Martin, was accepted as a passenger by the defendant company, and took his seat in a caboose attached to one of its freight trains then standing at the station of Rocky Mount. This train was a double-header, and consisted of about thirty cars. On the front of the train were a number of air cars. Shortly after the plaintiff took his seat, the train pulled forward a few feet, and then "gave a hard jam" (plaintiff's own words), which threw him against the side of the car, bruising his nose, and injuring a front tooth.

In another portion of his testimony the plaintiff says he was "sitting on his seat, when all of a sudden there was some kind of a

tremendous jam against the car which knocked him right forward against the ceiling, mashing his nose and breaking some teeth."

Other witnesses for the plaintiff prove the grade at Rocky Mount and at Saunders siding and Ferrum. The plaintiff proves that there were no jars felt at either Saunders siding or Ferrum, when the train stopped at those points, after leaving Rocky Mount. The grade at Rocky Mount, beginning some little distance above the depot, is shown to descend towards the west at the rate of three-sixteenths of an inch in every two and a half feet, that is about thirty-four feet to the mile.

A passenger on a freight train assumes the risks and inconveniences necessarily and reasonably incident to that mode of travel, but the degree of care required to avoid damage to the passenger is as high in the case of a traveler in a caboose as in that of one who travels in a palace car. Still persons taking passage on freight trains, which are primarily constructed and operated for the transportation of merchandise, cannot expect or require all the safeguards against danger which they may demand on trains devoted to passenger service; and they are held to accept the accommodations provided by the company, subject to all the ordinary inconveniences and hazards incident to such trains when made up and equipped in the ordinary manner of making and equipping such trains, and managed with proper care and skill.

The jerking and jolting is greater and more severe in the ordinary handling of such trains than occurs on a passenger train run under due care. Courts may take notice of that which is a matter of common knowledge or experience; and it is a matter of common knowledge and of experience that freight trains, in order to be handled, must have more or less slack; and in starting or stopping, slack is liable to cause jolts and jars which sometimes throw passengers down, when sitting in their seats; especially is this true when some of the cars are equipped with air and some are not, so that the brake cannot be applied from the engine throughout the train.

In the case in hand there is no evidence of defects in the track, train or appliances, or lack of skill in handling or manipulation of the train, unless such lack of skill is to be inferred from the jam or jolt, which caused the injury in question. It is urged that upon proof of the jam and of the plaintiff's injuries, the latter has proved his case—that negligence on the part of the defendant company has

been sufficiently shown. It is true that if a passenger is injured in a collision or by the upsetting of a car, the breaking of an axle, wheel or other portion of the machinery, as in *Southern Railway Co.* v. *Dawson,* 98 Va. 577, then he is not required to do more than to prove the fact, and the nature and extent of his injuries. *Res ipsa loquitur.* The onus is on the carrier to disprove negligence, when the physical facts of an accident themselves create a reasonable probability that it resulted from negligence—the physical facts are evidential and furnish evidence of negligence.

Do the physical facts in this case create a reasonable probability that the accident resulted from negligence? Entering upon this inquiry, we must bear in mind the known facts of common knowledge and experience relating to shocks, jars, jolts and bumps incident to the manipulation of freight trains, as well as the decisions of the courts of last resort in those cases which have come before them.

In the case of *Ferguson* v. *N. & W. R. Co.,* 79 Va. 244, the plaintiff was thrown from the car by its heavy lurching as it went around a short curve at a high rate of speed. Ferguson failed of recovery, and properly, on the ground of contributory negligence, but the court in speaking of the circumstances of the accident, and the management and control of the train, uses the following language:

"There was no accident to the train or any occurrence whatever other than the usual and inevitable incidents to the running and management of the freight trains around curves and down grades, the evidence shows no negligence or want of skill on the part of the employees of the road, or any defect in the structure or condition of the road, or in its machinery and equipment—the presumption of negligence does not attach itself to every injury which may overtake a passenger while being transported in a car."

In *Wait* v. *Omaha R. R. Co.,* 65 S. W., a passenger in the caboose of a freight train was thrown down by a sudden stoppage of the train; the jolt was so severe that it broke two ribs, loosened others from his backbone, and otherwise injured him. The court, while recognizing the same law as prevails in Virginia relating to the duty of common carriers to passengers on freight trains, speaks of the above shock and the circumstances of the accident as follows:

"There is no evidence to show any want of skill or care on the part of the employees of the company in the management of the train or that the train was stopped in an improper manner, or that the shock which caused the fall was not

a natural and ordinary incident of the stoppage of such a train, in a proper manner, by the proper application of the proper means for that purpose."

In *Fatheringham* v. *Denver & Rio Grande R. R.,* 68 Pac. 979, it appears that the plaintiff, a lady, was injured by the jerking of the train. The court, speaking of this jerking, says, that it did not appear that it was unusual or attended with danger or even inconvenience to passengers remaining in their seats.

The comments and opinions of the courts in the cases cited may be applied *mutatis mutandis* to the case in hand. Bearing in mind what we know as a matter of common knowledge, concerning the jolts and shocks incident to the manipulation of long and heavy freight trains, it can hardly be said that in the case of a double-header over 1,000 feet in length, the mere proof that a jar was occasioned in its manipulation at the place of unloading, sufficient to throw a passenger against the side of the caboose, break his nose and loosen his teeth, will raise the presumption of negligent operation against the company and put it upon proof that it was not negligent. When a broken wheel, axle, coupling, etc., is shown, the presumption of negligence arises on proof of the physical fact —it is sufficient to raise the presumption.

The presumption is also said to attach when the accident is due to a want of care or diligence on the part of those employed, but it will be observed that when you prove the want of care on the part of the employees you have proved negligence directly—want of care in operation of the agencies of the company is negligence. Proof of a broken axle, a physical thing, establishes a presumption of negligence on the part of the road, because roads cannot be properly operated with broken axles, but proof of a jam on a freight caboose does not *per se* prove negligence, because the manipulation of heavy freight trains is frequently, as a necessary incident, accompanied with heavy shocks and jams, hence the conclusion of negligent operation is not inevitable—the law will not presume negligence. When liability depends on negligence the plaintiff must establish it; he must prove something which warrants that inference, and not leave his case upon facts just as consistent with care and prudence as the opposite. *Nelson* v. *Lehigh Valley R. R. Co.*—New York Supp. 69. A case which depends upon the establishment of negligence for recovery, cannot be left to conjecture.

In an action to recover damages for an injury inflicted through the alleged negligence of the defendant, the burden is on the plain-

tiff to prove the negligence alleged, and the evidence must show more than a mere probability of negligence. It is not sufficient that negligence is consistent equally with the existence or non-existence of negligence; there must be affirmative and preponderating proof of the defendant's negligence. *N. & W.* v. *Cromer,* 99 Va. 764.

The proof of negligent operation is sought to be aided by showing there were no shocks or jams on the train when it stopped at Saunders siding and Ferrum; but the conditions at these places differed from those at Rocky Mount; the train approached both of them on a continuous up grade, came to a stand-still, and left on the same grade, with the cars all strung out and taut.

The engineer on the train testified that it was composed of about thirty cars of different lengths; that it was managed as usual; that there were no unnecessary bumpings; that the bump in question was caused by the slack, the non-air cars coming up against the air cars; that it was unavoidable and could not be prevented; that the cars were under as much control as possible; that he had thirteen air cars on the train on that day; that he was going slow when he stopped at Rocky Mount; that the concussion is greater when the air brakes are applied on a train going slow than when it is going fast; that when you apply the air brakes on the air cars in front, the air cars are stopped and the non-air cars have to come up until all the jam comes up, and the rear car is the worse bumped. So much of this evidence as applied to the operation in detail of the day of the accident, may be considered as qualified by the statement of the engineer that he testifies only from what is his habit or accustomed mode of handling the train; but this qualification is not to be applied to what he says as an expert touching the cause of bumps and jars on a freight train composed of air and non-air cars.

The conductor of the train testified that the train was conducted all right; that nothing unusual happened; that there was no unnecessary bumping or knocking; that the train was under control; that there was no slacking back.

It is evident that proof of the physical fact that there was considable jam on the train in question is consistent with the proper manipulation of the train. While it may have been the result of negligence, there is no proof of negligence further than the jam,

and the injury; hence the plaintiff has failed to sustain the burden which the law imposes upon him.

The law of this case is, therefore, with the demurrant.

NOTE.—We are glad to publish this opinion, not for its intrinsic merit only, but because it establishes (so far as this term may be applicable to a *nisi prius* opinion) a principle not authoritatively settled in Virginia—namely, that mere proof of the happening of an accident to a passenger does not necessarily, in every case, raise the presumption of negligence on the part of the carrier. In this case, the plaintiff was a passenger on a freight train. He proved that he was injured by a sudden jerking or jarring of the train, but failed to prove that any appliance was defective or deranged, or that the company was negligent in other respects, unless negligence was presumed from the circumstances proved. The court held, on a demurrer to evidence, that the plaintiff had failed to make out a *prima facie* case of negligence.

The rule of presumptive negligence is generally stated broadly to be, that if the passenger is injured, *prima facie* the result is attributable to the carrier's negligence, and the burden is on the carrier to repel the presumption by affirmative evidence.

There are *dicta* to this effect in several Virginia cases, but, the precise point not being involved, the question may be regarded as still *res integra*. See *Farish* v. *Reigle*, 11 Gratt. 697, 709 (where the injury was due to the overturning of a stage coach); and *B. & O. R. Co.* v. *Wightman*, 29 Gratt. 431, 444-445, and *B. & O. R. Co.* v. *Noell*, 32 Gratt, 394, 399 (in both of which the injury resulted from the breaking down of a bridge). In each of these cases the rule was stated to be that if the accident happens to a passenger by the breaking down or overturning of the carrier's vehicle, or the breaking down of a bridge or wheel, or axle, "or by *any other accident occurring on the road*," there is a *prima facie* presumption of negligence. But this is probably stating the rule too broadly. There is in fact no presumption of negligence raised against the carrier by the *mere proof of injury* to a passenger. The presumption only arises where, in addition to the fact of the injury, the *circumstances producing the injury* are also shown, and these, of themselves, are sufficient, in the light of the rigid exactions demanded of the passenger carrier by the law, to justify the application of the rule of *res ipsa loquitur*. Undoubtedly, in determining whether the circumstances of the injury place the burden of explanation on the carrier, the courts lean in favor of the passenger, and accept much slighter circumstances as warranting the application of the rule of *res ipsa loquitur*, than in ordinary negligence cases. Where it appears that the passenger was injured by the breaking or derangement of any of the carrier's appliances, or in a collision, or in a derailment of the train, the courts are all agreed in presuming negligence of the carrier. Here, however, it is not proof of the injury to the passenger which gives rise to the presumption, but proof of the circumstances producing it. Beyond the case of injury by breakage or derangement of appliances, and collisions, each case must depend on its own circumstances, as to whether the presumption of negligence obtains. In some cases there would clearly be no such presumption—as, for example, where the only proof is that a passenger was found dead in his seat, or on the side of the track. As other circumstances are proved, tending to place the fault upon the carrier, the case becomes less clear for the carrier, until finally enough appears to place the burden upon the latter of clearing its own skirts. See Hutchinson on Carriers, secs. 799-801.